Issues in the RFA and BRC Processes Regarding the Treatment and Evaluation of Injured Workers

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Questions ?

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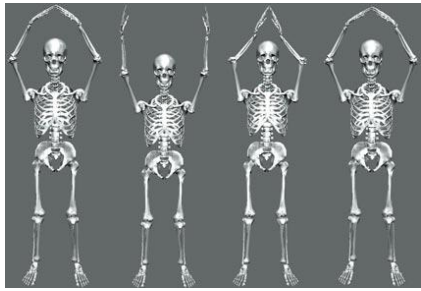
Occupational Health Center,



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Emergency Part/Full Time Job

- Due to the sudden, unexpected **death** of the Tennessee Division of Workers' Compensation FULL TIME Medical Director, I am the TEMPORARY "Fill in" replacement Medical Director.

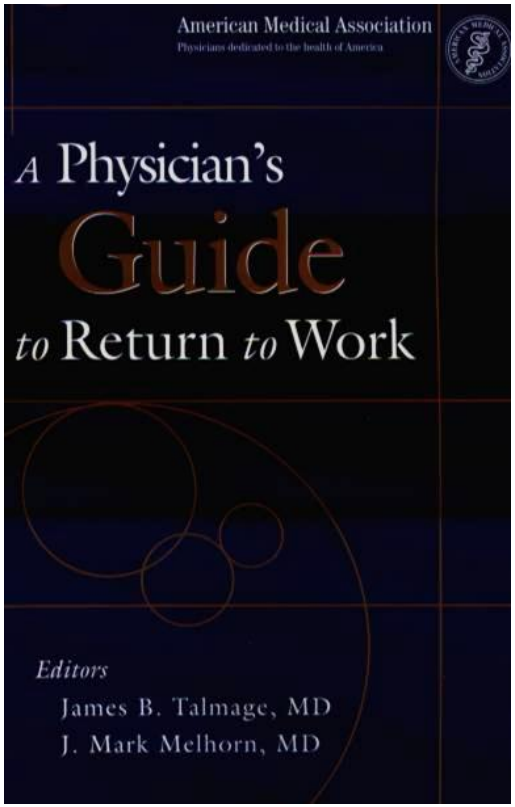
Which "Jim" is SPEAKING ??

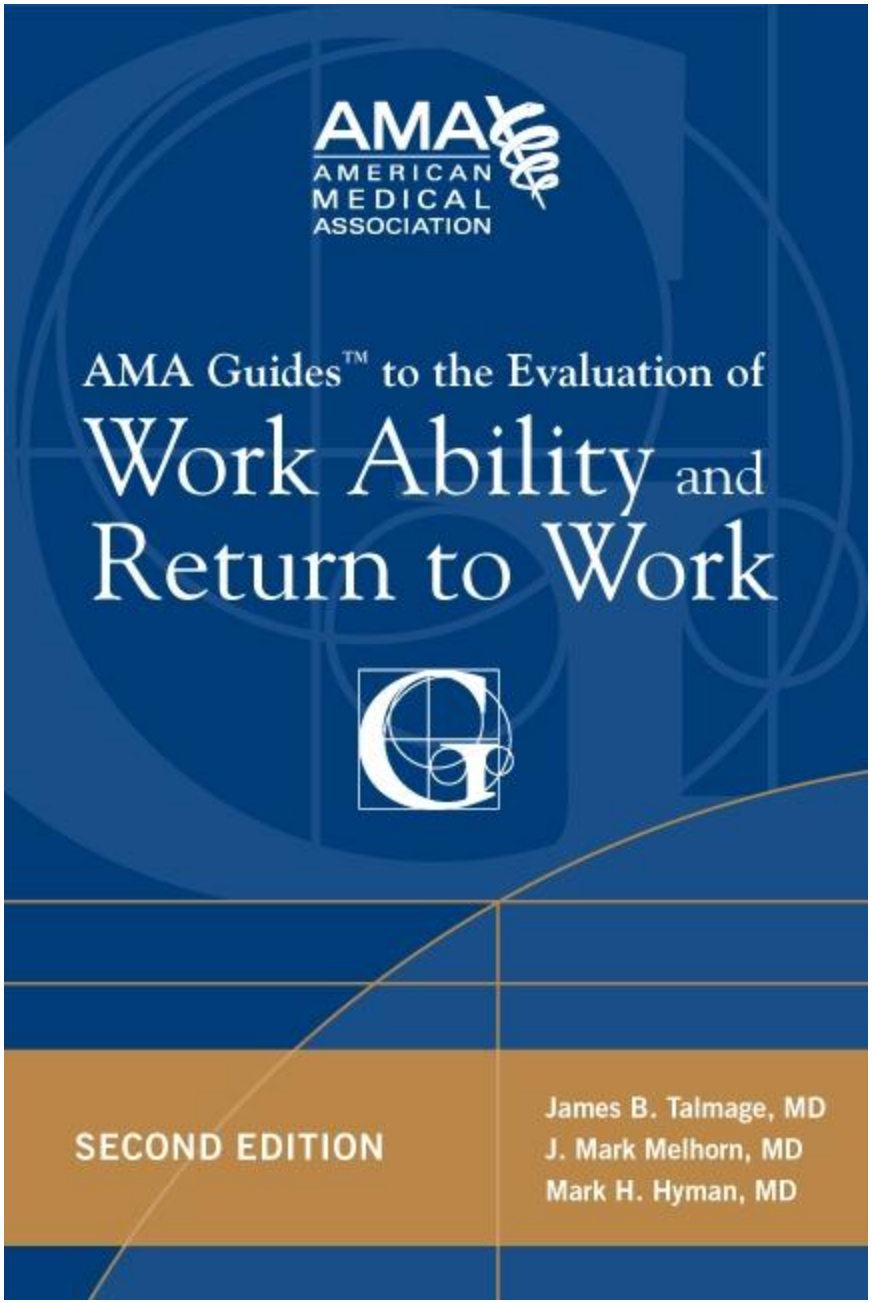
- I treat injured workers in an Occupational Medicine private practice
- I do IMEs (one/week)
  - For the defense
  - For the plaintiff
  - For the TN MIR program
- **I do file reviews**
  - Utilization review for insurers
  - Impairment rating review for defense and plaintiff attorneys
- **I am temporarily** functioning as the Division of Workers' Compensation's **Medical Director**
  - Deciding Utilization Referral Appeals

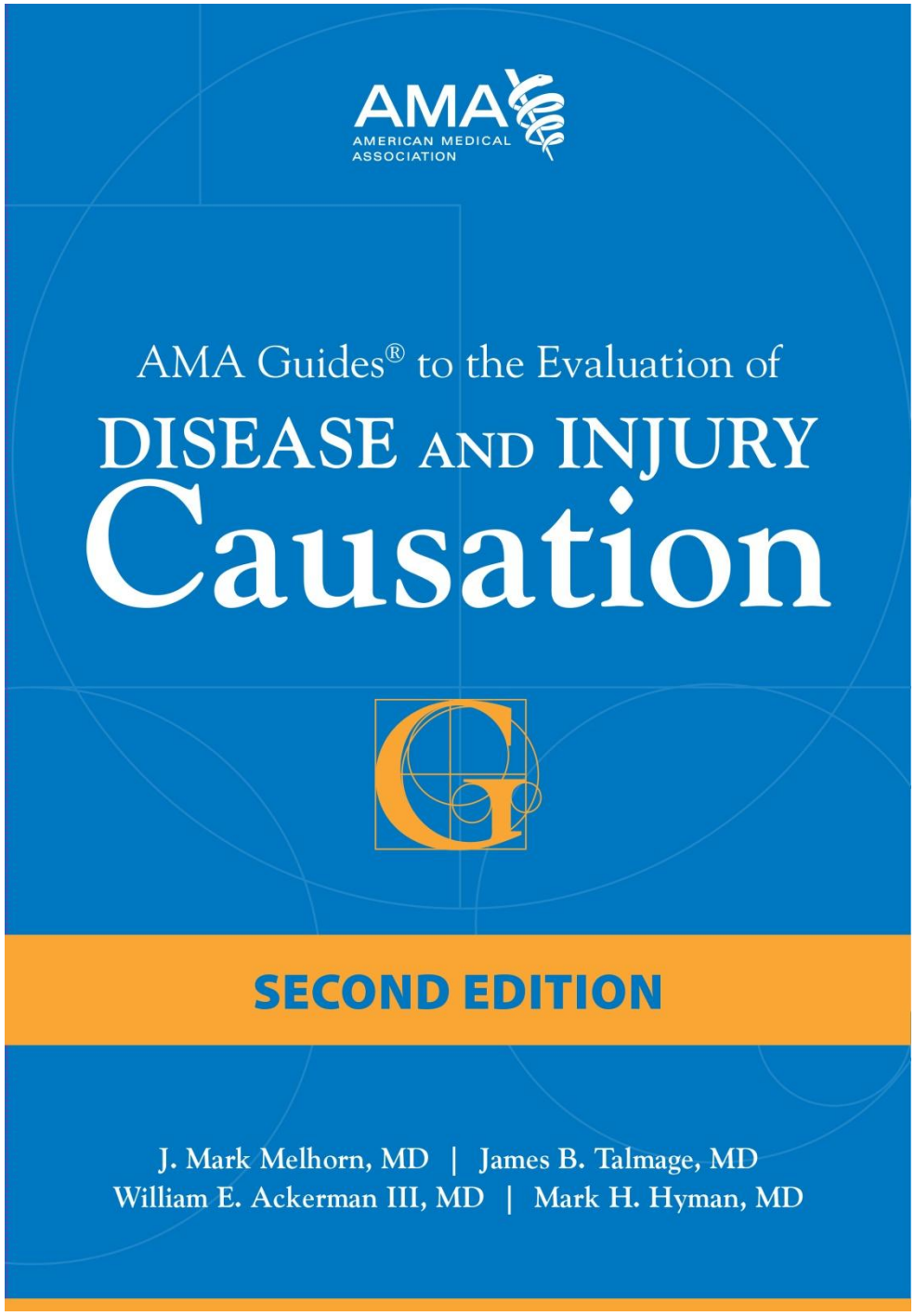
AMA Publications

2011

- 2nd Edition
- I receive royalties







Summer 2013

I **Will Receive**

Royalties

3 Major Considerations: Terms to Understand

- Risk
- Capacity
- **Tolerance**

"When I use a word," Humpty-Dumpty said, "It means just what I choose it to mean – neither more nor less."

Lewis Carroll, Alice's Adventures in Wonderland, Chapter 6

Words on Forms

- **Risk**: basis for **physician** **imposed** **"work restrictions" (line on forms).**
  What the patient should NOT do, based on risk.
  - **MAY NOT** drive a commercial vehicle with epilepsy.
- **Capacity**: basis for **physician** **described** **"work limitations" (line on forms)**
  What the patient is **NOT** able to do.
  - **CANNOT** flex or abduct right arm at the shoulder more than 80º, thus **cannot** reach overhead controls on a factory press.

Words on Forms

- **Tolerance**: basis for **patient decision** as to whether or not the **rewards** of work are **worth the "cost"** of the symptom.
  - What the patient **can do**, but **dislikes** doing, or **chooses not do**, because of symptoms.
  - **No place** to describe this on most return to work forms.
  - **Unique to each patient**.
    (Not predictable by the objective findings)

Risk: Legal Standard
Americans with Disabilities Act

- Employer may require that the worker **Not** pose a direct threat to Self or Others
  - High Probability (not clearly defined)
  - of specific Substantial Harm (not ↑ symptoms)
  - that is imminent (≤ 3 months, not future)
- Based on **Objective Medical Evidence** related to the particular individual

The OTHER side of the coin

- If the ADA specifies when an employer can **not** **stop** a patient/employee from doing a job, the **logical application** is that in the disability arena a **physician** should **not** attempt to **prohibit** that same patient from doing the same job.

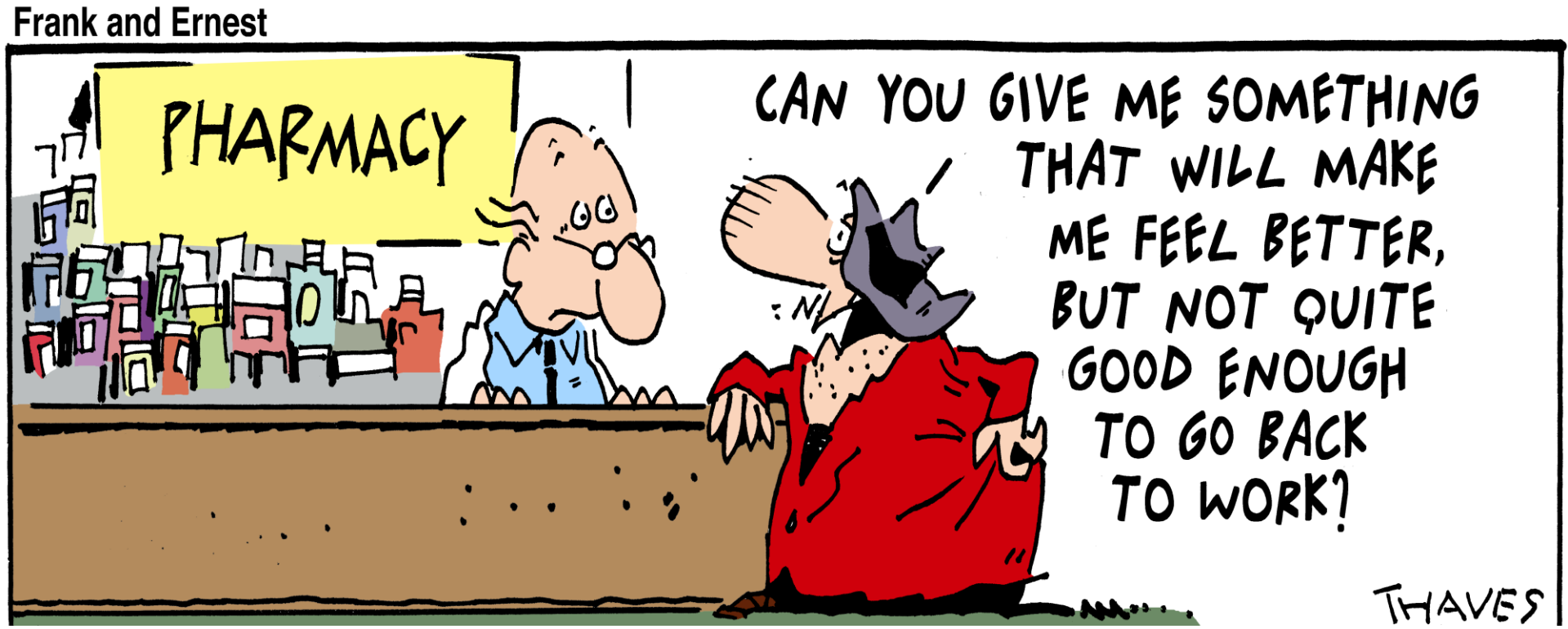
Roelfs et al. Losing life and livelihood:
A systematic review and meta-analysis
of unemployment and all-cause mortality.
Social Science & Medicine 2011:72; 840-854

- The study is a random effects meta-analysis and meta-regression designed to assess the association between **unemployment and all cause mortality** among working-age persons.
- We extracted 235 mortality risk estimates from **42 studies**, providing data on more than **20 million persons**.

Roelfs et al.
Social Science & Medicine 2011:72; 840-854

- The mean **hazard ratio (HR) for mortality was 1.63** among HRs adjusted for age and additional covariates.
- The mean effect was **higher for men** than for women.
- Unemployment was associated with an **increased mortality risk** for those in their **early and middle careers**, but less for those in their late career.

Even if the patient
does not want to return to work,
it is **usually in his/her best interest**
to WORK.



Epidemiology of Pain
AMA "Guides", 6th Edition" (p 34)

- "Persistent Pain is a major health problem, with between 18% and 50% of the population reporting continuous pain for at least **3** of the last **6** months."

Epidemiology of Pain

- In a population based study involving approximately 2000 participants discovered that **only 13.2% of the participants reported being pain free at the beginning of the project.**
- [Kamaleri Y, Natvig B, Ihlebaek CM, Benth JS, Bruusgaard D. Change in the number of musculoskeletal pain sites: A 14-year prospective study. Pain. 2009 Jan;141(1-2):25-30]

Pain. 2009 Jan; 141(1-2): 25-30

Table 1
Number of pain sites (past 12 months) in 1990 and 2004 and stability of reporting (% unchanged, 1990–2004)

1990			2004		
Number of pain sites	*n*	%	Mean NPS[a]	95% CI	% Unchanged
0	211	13.2	1.9	1.7–2.2	27.0
1	181	11.3	2.7	2.4–3.1	14.4
2	201	12.6	3.6	3.2–3.9	11.4
3	203	12.7	3.8	3.5–4.1	17.2
4	201	12.6	4.2	3.9–4.6	15.9
5	181	11.3	5.2	4.8–5.5	13.8
6	166	10.4	5.4	5.0–5.8	14.5
7	116	7.3	5.9	5.5–6.4	11.2
8	59	3.7	6.4	5.7–7.0	13.6
9	38	2.4	7.1	6.3–8.0	13.2
10	39	2.4	8.3	7.8–8.9	41.0

[a] Number of pain sites.

Epidemiology of Pain

- In a prospective study of over 4000 workers from industrial and service companies [Denmark]
  - only 7.7% were free of pain at baseline and
  - only 38% were **free** from **severe** pain.
  - Andersen JH, Haahr JP, Frost P. A Two-Year Prospective Study of a General Working Population. *Arthritis & Rheumatism* 2007; 56 (4): 1355-1364.

Epidemiology of Pain

- The Gallop poll of U.S. adults in 2011 found that
  - 31% have chronic neck or back pain
  - 26% have knee or leg pain, and
  - 18% have some other chronic pain.
  - **47% percent** of the adults had **at least one** of these chronic pain problems.
  - http://www.gallup.com/poll/154169/chronic-pain-rates-shoot-until-americans-reach-late-50s.aspx

Epidemiology of Pain

- The Institute of Medicine 2012 report "Relieving Pain in America" estimates **116,000,000** adult Americans have chronic pain.
  - [Institute of Medicine. Relieving Pain in America: A Blueprint for Transforming Prevention, Care, Education, and Research. http://www.nap.edu/catalog.php?record_id=13172 or paperback ISBN 978-0-309-25627-8]
  - The 2012 U.S. adult population is estimated at **228, 365,240.** [http://en.wikipedia.org/wiki/Demographics_of_the_United_States]
  - This would calculate at **just over 50% of adult Americans having chronic pain.**

Tennessee DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT

Working Together with Teamwork

Issues in the RFA and BRC Processes Regarding the Treatment and Evaluation of Injured Workers

Richard Fishbein, M.D.

AMA *Guides*

Note Table 2-1, Fundamental Principles of the *Guides*

2.3b Examiner's Roles and Responsibilities. "Although treating physicians may perform impairment ratings on their patients, it is recognized that these are not independent and therefore may be subject to greater scrutiny."

Points of Discussion

- **Functional Capacity Evaluations**
  - When should they be performed?
  - Purpose
  - Use of FCE results in impairment assessments

- **Interactions with Nurse Case Managers**
- **Long-term pain management**
- **Utilization Review**

Shoulder Injuries – Repeat Surgeries and Impairment

- Distal clavical and acromioplasty
- Rotator cuff repair
- If the *Guides* have more than one method to determine impairment, then the physician must choose the highest impairment rating
- Per the *Guides* p. 419, in rare cases, the examiner may combine multiple impairments within a single region if the most impairing diagnosis does not adequately reflect loss

Spinal Fusion Surgeries vs. Conservative Treatment

- Opiate Dependence
- Impact on Return to Work
- Surgical Complications/Success Rates

Illustrative Case – Cervical Spine

- **October 2008** – MRI reveals disc protrusions at C 5-6 and C 6-7
- **March 2009** – Discectomy and anterior plate fixation at C5-6 and C6-7
- **May 2009** – 19% IR after reliable FCE showed medium to heavy work capacity
- **March 2012** – New work injury. Radiculopathy. MRI shows stenosis with nerve root impingement C3-4 and C4-5
- **September 2012** – Discectomy and plate fixation C4-5 with removal of C5-7 plate
- **December 2012** – Good arm pain relief, residual neck soreness. 0% additional impairment. No work restrictions

Tennessee DEPARTMENT OF LABOR & WORKFORCE DEVELOPMENT

Working Together with Teamwork

What Does it Take to Avoid TDOL Landmines?

Robert Durham, Assistant Director of Benefit Review

Pre-RFA

Send a letter of representation to the employer and/or adjuster handling the claim, letting them know as soon as possible that your client has alleged a work-related injury and that you will be representing them on the claim.

Make an effort to communicate by telephone with the adjuster as soon as possible to discuss any possible issues in the case.

Request a copy of the First Report of Injury.

If one has not been provided, insist on a proper panel of authorized treating physicians presented on the proper state form and have your client select a physician as soon as possible.

Pre-RFA

Insist on a wage statement provided on a proper state form and make sure that it is accurately calculated.

File a completed Request for a BRC to toll the statute of limitations even if it is not close to running.

Cooperate with the adjuster in providing reasonable and necessary medical records and/or authorizations and a statement from your client.

If there are issues, communicate with the adjuster or defense attorney and try working them out, even after you have filed a request for assistance with the Department.

"New" Request for Assistance Process

The RFA **must be filled out completely** before submitting to the local the Department of Labor Office.

The assigned Workers' Compensation Specialist will request information from the parties that is determined to be relevant to the RFA and will mediate any disputes that remain.

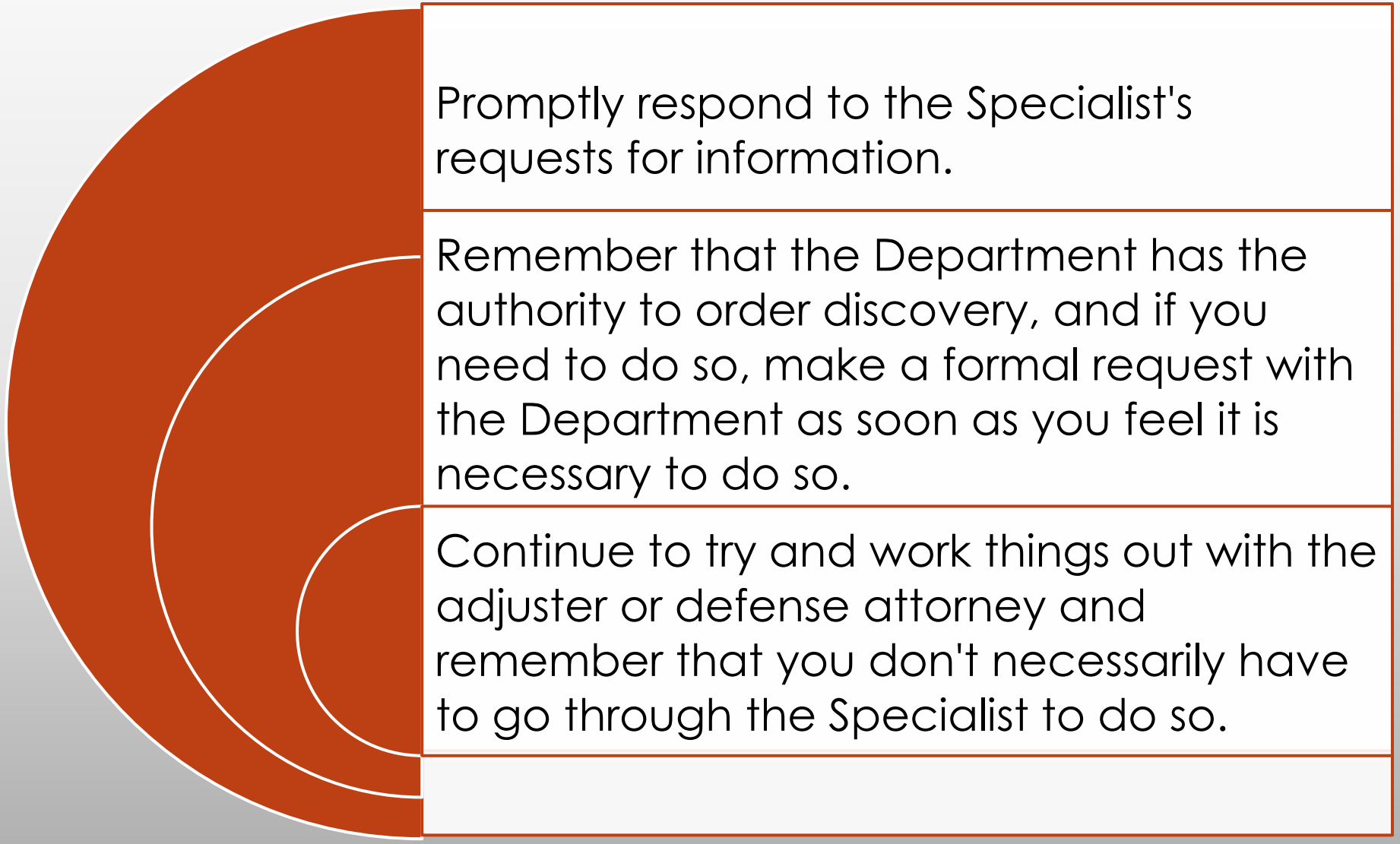
Stage One

Attach relevant medical records and a well-defined statement of the issues to your RFA if at all possible. Include any information you feel may be helpful to the ultimate resolution of the matter as soon as you can.

Contact the Specialist assigned to the file as soon as you find out who it is so that you can begin working on information they need.

Give the Specialist access to your client.

Stage One

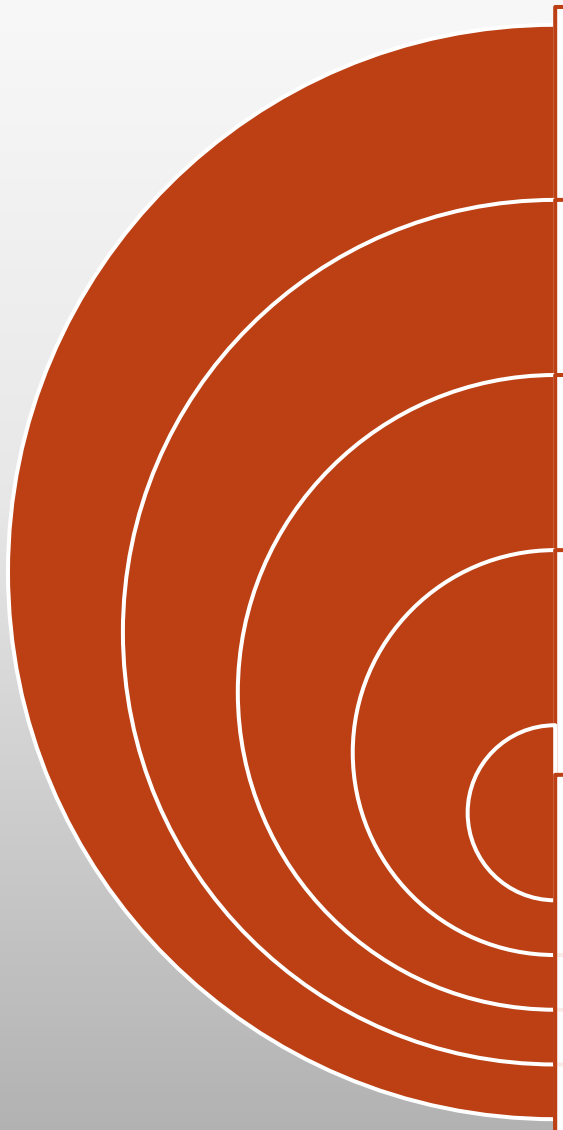

Promptly respond to the Specialist's requests for information.
Remember that the Department has the authority to order discovery, and if you need to do so, make a formal request with the Department as soon as you feel it is necessary to do so.
Continue to try and work things out with the adjuster or defense attorney and remember that you don't necessarily have to go through the Specialist to do so.

Stage One

Remember that one of the priorities of the new process is the *timely* resolution of Requests for Assistance. Therefore, the Specialists are working under a deadline for each RFA. If you discover that you won't have sufficient time to obtain the information necessary to establish your client's claim, there is no penalty for withdrawing your RFA and re-filing when you do have the necessary information.

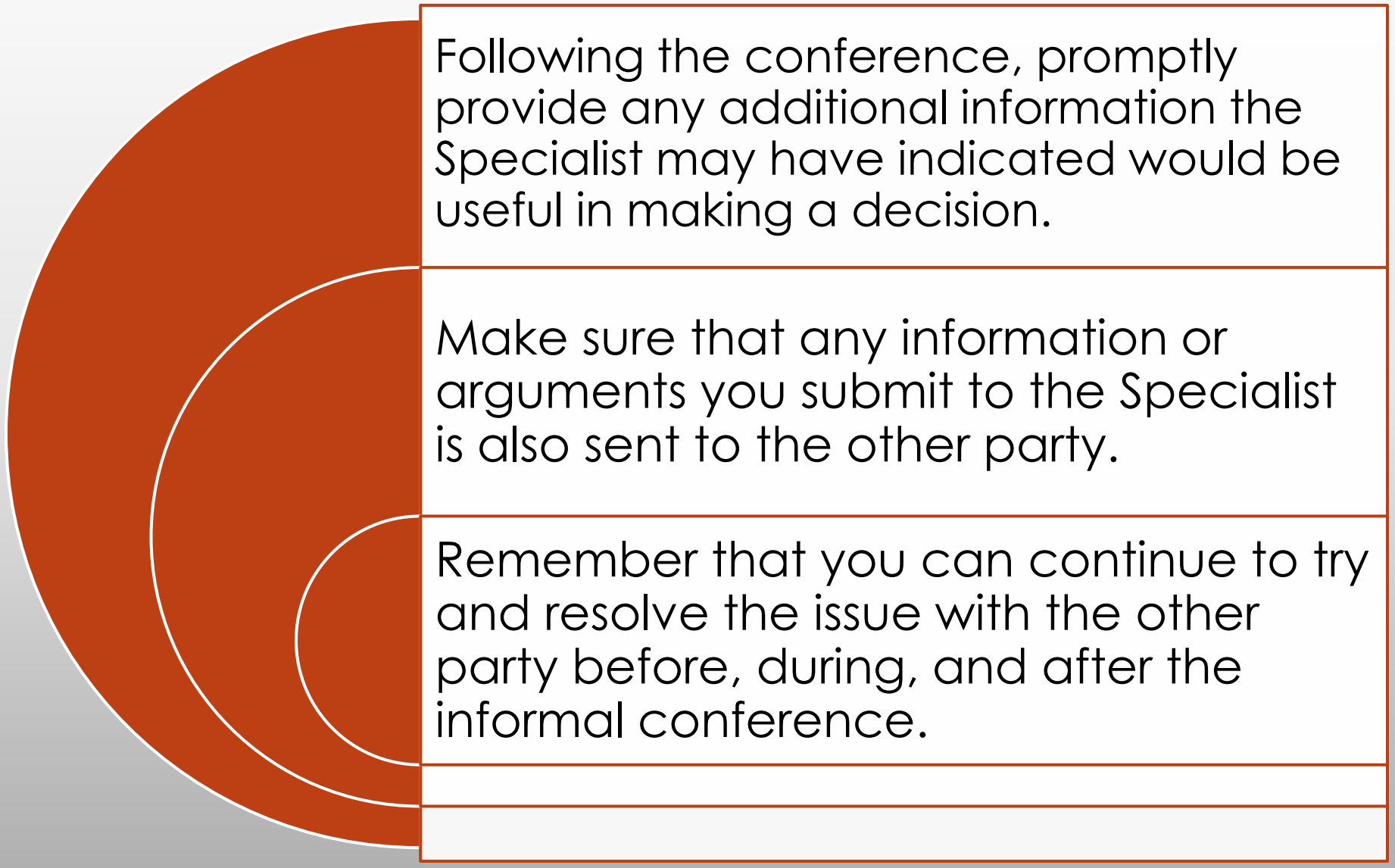
Once the Specialist has determined that the matter is "deadlocked" cooperate as quickly as possible in providing dates and times for the informal conference.

Stage Two

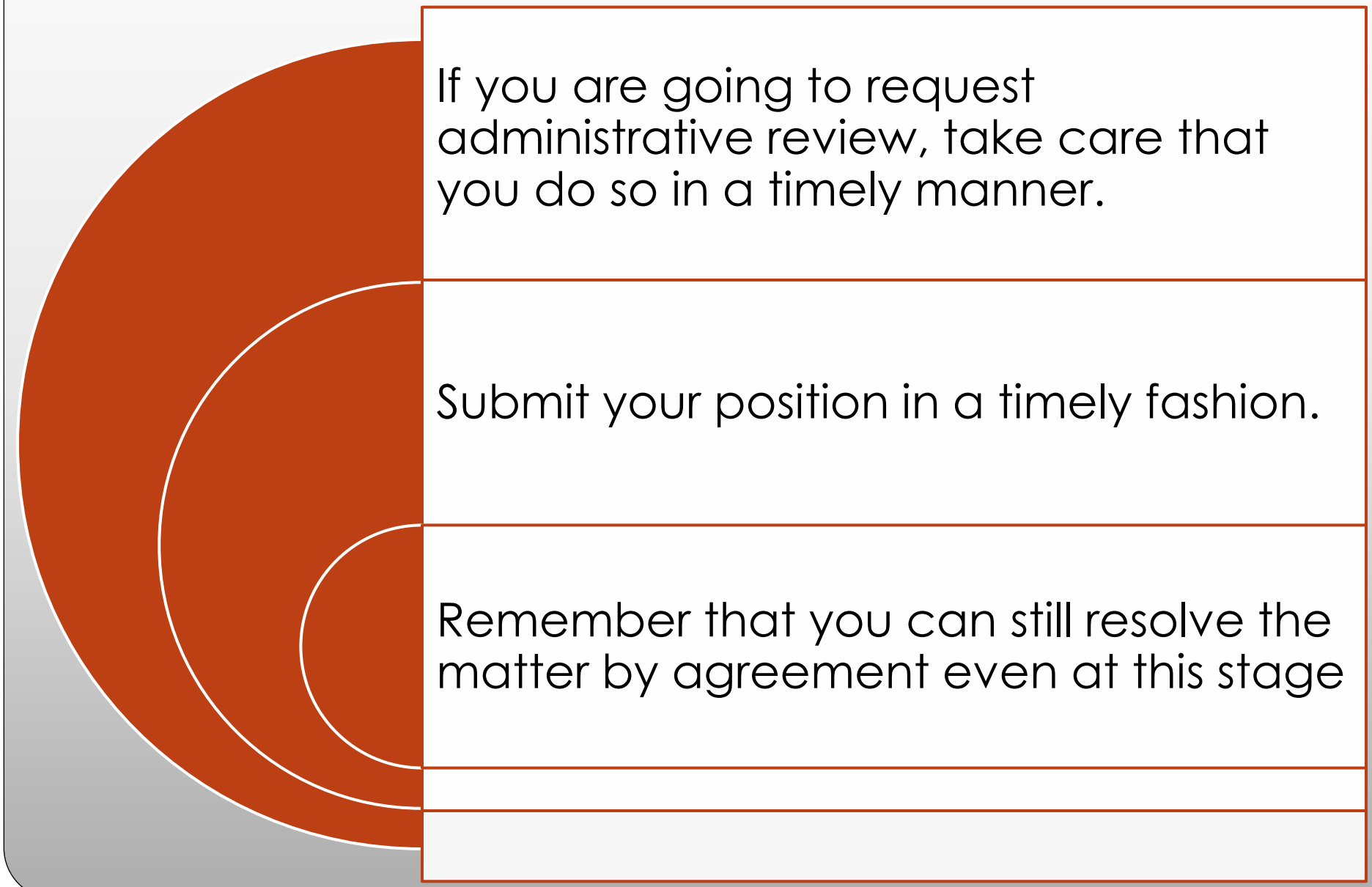


- Consider providing a written position statement outlining your argument for benefits.
- Call in on time for the teleconference and be prepared.
- Have your client and any potential witnesses available for the teleconference.
- Make sure the Specialist hearing the matter understands what the issues are and your position on them.
- Remember the possibility that any information you fail to provide to the Specialist hearing the matter may not be considered by Administrative Review when they are rendering their decision.

Stage Two


Following the conference, promptly provide any additional information the Specialist may have indicated would be useful in making a decision.
Make sure that any information or arguments you submit to the Specialist is also sent to the other party.
Remember that you can continue to try and resolve the issue with the other party before, during, and after the informal conference.

Stage Three


If you are going to request administrative review, take care that you do so in a timely manner.
Submit your position in a timely fashion.
Remember that you can still resolve the matter by agreement even at this stage

When an RFA is filed….

- ✓ RFA Form (C40A) must be accurately completed
- ✓ Contact the Specialist
- ✓ Provide all relevant documentation as quickly as possible
- ✓ Maintain contact with opposing counsel
- ✓ Resolve the issue by agreement if possible
- ✓ Provide dates for a conference if deadlock has been reached

The BRC

Be prepared, on time and focused on the mediation.

Negotiate in good faith.

Utilize the expertise of the mediating specialist.

Treat the Specialist, the opposing party and the BRC process with respect.

Post Settlement

Don't abandon your client.

Remember that you can get attorney fees for pursuing and obtaining medical benefits for your client and those awards can be substantial.

Compliance

The Workers' Compensation Compliance Program will investigate and penalize parties for :

- ✓ Failure to appear at a Benefit Review Conference
- ✓ Not providing full settlement authority
- ✓ Not negotiating in good faith at a Benefit Review Conference.

PENALTIES RANGES FROM $50 TO $5,000

Utilization Review LANDMINES

Sending Prescriptions Through Utilization Review Except When Allowed by the New Pain Management Statute

- This does not quality as a "recommended treatment" under the rules
- The Division will not be bound by a UR Denial

Addressing Causation in the Review

- UR only covers the medical necessity of a recommended treatment
- Is the recommended treatment medically necessary for the employee's condition?
- Causation must be addressed separately

Not Including the Appeal Form (C-35A) With a Denial

- This is required to accompany all denials
- If you don't include it, then the IW or ATP may be allowed to appeal outside of the 30-day window

Utilization Review LANDMINES

Sending Referrals for Evaluation Through Utilization Review

- This is not a "recommended treatment"
- UR is for specific treatments with a CPT code
- Once the physician evaluates the IW and recommends a particular treatment, then you can initiate UR

Not Performing a Review Within the Timelines

- You have 3 business days to send to UR
- UR has 7 business days to complete the review (can get an additional 5 days if reviewer makes a written request for additional information)
- The Division may invalidate the denial if not done timely

Not Using an Appropriate Peer Review

- Must be a TN-licensed physician in the same or similar specialty as the ATP
- The Division will invalidate a denial if the peer reviewer does not have an active TN license
- Nurses can approve, but not deny
- Credentials must be included in the report

Utilization Review LANDMINES

Do Not Have Conflicting Denials

- No circular logic please
- i.e., surgery is denied because IW has not had PT, but PT was denied the month before!

Retrospective Review of Non-Emergent Care

- Emergency treatment can be reviewed retrospectively, but non-emergent treatment must be reviewed prospectively
- If non-emergent care has already been provided, then don't bother with UR

The Peer Reviewer Does Not Have Adequate or Updated Records

- If we get 50 pages of records during an appeal, but the peer reviewer only reviewed 5 pages, then there's something wrong
- The peer reviewer needs to make an effort to get the additional necessary records